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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

RALPH HERRERA et al., Plaintiffs and Appellants, v. F.H. PASCHEN/S.N. NIELSEN, INC. et al., Defendants and Respondents.	D051369 (Super. Ct. No. GIC846147)

APPEAL from a judgment of the Superior Court of San Diego County, Charles R. Hayes, Judge. Reversed.

I.

INTRODUCTION

Ralph Herrera and Paul Brenner filed this action against their former employers, F.H. Paschen/S.N. Nielson and Westcoast Corp. (collectively F.H. Paschen).[1] In their

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1 Herrera and Brenner also sued Carlos Magallanes, one of their former supervisors at F.H. Paschen. In December 2005, the trial court granted Magallanes's motion for judgment on the pleadings, and subsequently entered judgment in favor of Magallanes. Herrera and Brenner have not appealed the trial court's judgment as to Magallanes.

complaint, Herrera and Brenner alleged that F.H. Paschen had committed various Labor Code violations. F.H. Paschen filed a motion for summary judgment in which it claimed that both Herrera and Brenner were exempt from the Labor Code provisions at issue, since they were persons employed in an administrative capacity, as defined in Industrial Welfare Commission Wage Order 16-2001 (Cal. Code Regs., tit. 8, § 11160). The trial court granted F.H. Paschen's motion for summary judgment and subsequently entered judgment in favor of F.H. Paschen as to both Herrera and Brenner.

On appeal, Herrera and Brenner claim that the trial court erred in concluding that F.H. Paschen established, as a matter of law, that they were exempt employees. We agree and reverse the judgment.

II.

FACTUAL AND PROCEDURAL BACKGROUND[2]

In July 2005, Herrera and Brenner filed a 10-count complaint against F.H. Paschen. In their complaint, Herrera and Brenner alleged, among other causes of action,

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2 We base our statement of facts primarily on the undisputed evidence to which the parties refer in their separate statements of facts. (See *Coburn v. Sievert* (2005) 133 Cal.App.4th 1483, 1489.)

We decline F.H. Paschen's request that we disregard appellants' opening brief on the ground that appellants cited only the parties' separate statements of facts rather than the evidence supporting those statements. (See *Stockinger v. Feather River Community College* (2003) 111 Cal.App.4th 1014, 1025 [exercising discretion to disregard party's failure to provide record citations to evidence supporting facts asserted in a separate statement of facts].)

that F.H. Paschen had failed to pay them overtime (Lab. Code, §§ 510, 1194),[3] failed to allow meal periods (§ 226.7), failed to allow rest periods (§ 226.7), and failed to pay prevailing wage rates (§§ 1194, 1770).

In February 2007, F.H. Paschen filed a motion for summary judgment on the ground that neither Herrera nor Brenner could prevail of any of their causes of action because both were subject to an exemption for administrative employees, under California law. Specifically, F.H. Paschen claimed that the undisputed evidence demonstrated that Herrera and Brenner each performed the job duties of an administrative employee, as defined in California Code of Regulations, title 8, section 11160.

F.H. Paschen is a general contractor. In the course of its business, F.H. Paschen enters into contracts with project owners to perform Job Order Contracts (JOC). Herrera and Brenner both served as project managers on a JOC with the County of San Diego (County). The JOC related to $3,000,000 worth of repairs and renovations. The County sought proposals from F.H. Paschen under the JOC for each specific item of repair or renovation work that it wanted F.H. Paschen to perform.

Before F.H. Paschen developed a proposal pursuant to the JOC, the County would provide F.H. Paschen with a general idea of the work to be performed. As project managers, Herrera and Brenner would visit the job site and consult with County employees in an effort to fully understand the scope of the work. Herrera and Brenner

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[3] Unless otherwise specified, all subsequent statutory references are to the Labor Code.

would consult with subcontractors regarding supplies needed to complete the work, and used a computer software program to develop a line-item JOC proposal. The cost of the proposal would be determined, in part, by the overall JOC contract, which specifies a series of multipliers that are to be applied to various items listed in a unit price book called the Construction Task Catalog.

In addition to developing proposals pursuant to the JOC, Herrera and Brenner also produced project schedules, coordinated with subcontractors, acted as liaisons with the County, coordinated material procurement and delivery, produced cost reports, documented changes that could affect project completion or budgets, and communicated with senior management concerning the status of projects.

In May 2007, the trial court granted F.H. Paschen's motion for summary judgment. In its ruling, the court reasoned in part:

> "Project Managers use their independent judgment and discretion when developing a detailed line item JOC project bid, when contacting and negotiating with project owners and/or subcontractors and when dealing with potential changes in the subcontractor's bids. It is the Project Manager's conclusions and recommendations that are used in compiling the bid proposal. The ability to properly bid a project directly impacts [F.H. Paschen's] day to day operations and financial success. Accordingly, the plaintiffs were properly classified as exempt employees."

In June 2007, the trial court entered judgment in favor of F.H. Paschen as to both Herrera and Brenner.

Herrera and Brenner timely appeal.

III.

DISCUSSION

The trial court erred in granting summary judgment in favor of F.H. Paschen

A. *Standard of review*

A moving party is entitled to summary judgment when the party establishes the right to the entry of judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant may make this showing by establishing that it has a complete defense to the plaintiff's causes of action. (*Towns v. Davidson* (2007) 147 Cal.App.4th 461, 466.) In reviewing a trial court's ruling on a motion for summary judgment, the reviewing court makes " 'an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law. [Citations.]' " (*Trop v. Sony Pictures Entertainment Inc.* (2005) 129 Cal.App.4th 1133, 1143, quoting *Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222-223.)

B. *F.H. Paschen did not establish as a matter of law that either Herrera or Brenner were subject to the administrative employee exemption*

1. *Governing law*

a. *Applicable statutes and regulations*

Section 515, subdivision (a) provides in relevant part:

> "The Industrial Welfare Commission may establish exemptions from the requirement that an overtime rate of compensation be paid pursuant to Sections 510 and 511 for executive, administrative, and professional employees, provided that the employee is primarily

> engaged in the duties that meet the test of the exemption, customarily and regularly exercises discretion and independent judgment in performing those duties, and earns a monthly salary equivalent to no less than two times the state minimum wage for full-time employment."[4]

The Industrial Welfare Commission has adopted a regulation governing "Wages, Hours and Working Conditions for Certain On-Site Occupations in the Construction, Drilling, Logging and Mining Industries." (Cal. Code Regs., tit. 8, § 11160.) This regulation establishes an exemption from its requirements for persons who are employed in an administrative capacity. The exemption provides, in relevant part, as follows:

> "(A) The provisions of Sections 3 through 12 shall not apply to persons employed in an administrative . . . capacit[y]. No person shall be considered to be employed in an administrative . . . capacity unless the person is primarily engaged in the duties which meet the test of the exemption, and earns a monthly salary equivalent to not less than two times the state minimum wage for full-time employment. The duties that meet the test of the exemption are one of the following set of conditions:
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> [¶] . . . [¶]
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> (3) To the extent that there is no conflict with California law, [fn. omitted] . . . the duties that meet the test of the administrative . . . exemption[] are defined as set forth in the following sections of the Code of Federal Regulations as they existed as of the date of this Wage Order: . . . 29 C.F.R. [§§] 541.2(a)-(c), 541.201, 541.205,

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4 While section 515, subdivision (a) authorizes the Industrial Welfare Commission to provide exemptions with respect to *overtime compensation*, Herrera and Brenner do not contend on appeal that they can prevail on *any* of their causes of action if they are in fact exempt employees. We therefore restrict our analysis, as the parties have, to the question whether the trial court properly determined that F.H. Paschen demonstrated as a matter of law that Herrera and Brenner are exempt employees.

541.208, and 541.210 (defining administrative duties)." (Cal. Code Regs., tit. 8, § 11160, subd. 1.)[5]

Part 541.2 of 29 Code of Federal Regulations (C.F.R.)[6] contains a multi-pronged definition of the term "employee employed in a bona fide . . . administrative . . . capacity." That regulation provides in relevant part:

> "The term employee employed in a bona fide . . . administrative . . . capacity in section 13(a)(1) of the act[7] shall mean any employee:
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> "(a) Whose primary duty consists of either:
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> "(1) The performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers, or
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> "(2) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and
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> "(b) Who customarily and regularly exercises discretion and independent judgment; and

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5 In the footnote that is omitted from the text above, the regulation provides, "Labor Code Section 515[, subdivision] (e) requires that an employee be 'primarily' engaged in exempt work, which means 'more than one-half of the employee's work time.['] Thus the 'primary duty' test set forth in federal regulations does not apply." (Cal. Code Regs., tit. 8, § 11160, subd. 1(A)(3), fn. 1.)

6 All citations to the C.F.R. are as it existed on January 1, 2001, the effective date of California Code of Regulations, title 8, section 11160. (See Cal. Code Regs., tit. 8, § 11160, subd. 1(A)(3) [providing for applicability of various provisions of the former C.F.R.].)

7 The act referred to is the Fair Labor Standards Act of 1938, as amended. (See 29 C.F.R. § 541.0.)

> "(c)(1) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations of this subpart), or
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> "(2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or
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> "(3) Who executes under only general supervision special assignments and tasks; . . . ." (29 C.F.R. § 541.2.)

Parts 541.201, 541.205, 541.208, and 541.210 of 29 C.F.R. are interpretative regulations that provide guidance regarding the definition of an employee employed in an administrative capacity, as set forth in section 29 C.F.R. part 541.2.

Of particular relevance to this appeal is 29 C.F.R. part 541.201(a), which interprets 29 C.F.R. part 541.2(c):

> "Three types of employees are described in § 541.2(c) who, if they meet the other tests in § 541.2, qualify for exemption as 'administrative' employees.
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> "(1) Executive and administrative assistants . The first type is the assistant to a proprietor or to an executive or administrative employee. In modern industrial practice there has been a steady and increasing use of persons who assist an executive in the performance of his duties without themselves having executive authority. Typical titles of persons in this group are executive assistant to the president, confidential assistant, executive secretary, assistant to the general manager, administrative assistant and, in retail or service establishments, assistant manager and assistant buyer. Generally speaking, such assistants are found in large establishments where the official assisted has duties of such scope and which require so much attention that the work of personal scrutiny, correspondence, and interviews must be delegated.
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> "(2) Staff employees.

> "(i) Employees included in the second alternative in the definition are those who can be described as staff rather than line employees, or as functional rather than departmental heads. They include among others employees who act as advisory specialists to the management. Typical examples of such advisory specialists are tax experts, insurance experts, sales research experts, wage-rate analysts, investment consultants, foreign exchange consultants, and statisticians.
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> "(ii) Also included are persons who are in charge of a so-called functional department, which may frequently be a one-man department. Typical examples of such employees are credit managers, purchasing agents, buyers, safety directors, personnel directors, and labor relations directors.
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> "(3) Those who perform special assignments.
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> "(i) The third group consists of persons who perform special assignments. Among them are to be found a number of persons whose work is performed away from the employer's place of business. Typical titles of such persons are lease buyers, field representatives of utility companies, location managers of motion picture companies, and district gaugers for oil companies. It should be particularly noted that this is a field which is rife with honorific titles that do not adequately portray the nature of the employee's duties. The field representative of a utility company, for example, may be a "glorified serviceman."
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> "(ii) This classification also includes employees whose special assignments are performed entirely or partly inside their employer's place of business. Examples are special organization planners, customers' brokers in stock exchange firms, so-called account executives in advertising firms and contact or promotion men of various types."

Part 541.201(b) of 29 C.F.R. cautions that "[j]ob titles [are] insufficient as yardsticks" in determining whether an employee is subject to the exemption, and further provides that "the exempt or nonexempt status of any particular employee must be determined on the basis of whether his duties, responsibilities, and salary meet *all the*

requirements of the appropriate section of the regulations in subpart A of this part [e.g. 29 C.F.R., part 541.2]." (Italics added.)[8]

b. *Case law regarding exemptions from the Labor Code*

"The exemptions are affirmative defenses, and thus an employer bears the burden of proving that an employee is exempt. [Citations.] Under California law, exemptions from mandatory overtime provisions are narrowly construed." (*Combs v. Skyriver Communications* (2008) 159 Cal.App.4th 1242, 1254.) Where elements of an exemption are stated in the conjunctive, all of the criteria must be established in order for the exemption to apply. (See *Eicher v. Advanced Business Integrators, Inc.* (2007) 151 Cal.App.4th 1363, 1372 (*Eicher*) ["Stated in the conjunctive, each of the five elements must be satisfied to find the employee exempt as an administrative employee"].)[9]

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8 Parts 541.205 and 541.208 of 29 C.F.R. provide additional guidance regarding portions of the other elements of the test for identifying which employees are subject to the administrative exemption defined in 29 C.F.R. part 541.2. Specifically, 29 C.F.R. part 541.205 interprets the phrase "directly related to management policies or general business operations," contained in 29 C.F.R. part 541.2(a)(1). Part 541.208 of 29 C.F.R. provides additional interpretative guidance on the meaning of the phrase "directly and closely related," which is contained in a provision of the federal regulations (29 C.F.R. § 541.2(d)) that the applicable California regulation does not incorporate. (Cal. Code Regs., tit. 8, § 11160, subd. 1(A)(3) [incorporating 29 C.F.R. § 541.2(a)-(c)].)

Part 541.210 of 29 C.F.R. provides that the exemption does not apply to employees who are training for employment in an administrative capacity, but who are not actually performing the duties of an administrative employee.

9 The five elements of the definition of an administrative employee that is contained in the regulation at issue in *Eicher*, California Code of Regulations, title 8, section 11040, subdivision 1(A)(2), are nearly identical to the elements contained in 29 C.F.R. part 541.2, which is at issue in this appeal. (See *Eicher*, *supra*, 151 Cal.App.4th at p. 1371, fn. 2.)

2. *Application*

a. *F.H. Paschen failed to establish, as a matter of law, all of the criteria necessary to demonstrate that Herrera or Brenner were subject to the administrative exemption*

In order to demonstrate that Herrera and Brenner were employees subject to the administrative exemption, F.H. Paschen was required to establish as a matter of law, among other elements, either that Herrera and Brenner fell within one of the three categories of employees set forth in 29 C.F.R. part 541.2(c), i.e., that they (1) "regularly and directly assist[ed] a proprietor, or an employee employed in a bona fide executive or administrative capacity," (2) "perform[ed] under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge," or (3) "execute[d] under only general supervision special assignments and tasks. . . ." (29 C.F.R. § 541.2(c).)

F.H. Paschen acknowledged this requirement in both the trial court and in this court. However, F.H. Paschen has provided *no* argument and cited *no* evidence regarding its demonstration of this element (29 C.F.R. § 541.2(c)) as to either Herrera or Brenner, in either court. Rather, F.H. Paschen restricted its briefing to the elements of the test for determining the applicability of the administrative exemption defined in 29 C.F.R. part 541.2 (a) and (b), namely attempting to demonstrate that Herrera and Brenner performed "office or nonmanual work directly related to management policies or general business operations of [their] employer" (29 C.F.R. § 541.2(a)(1)), and that they "customarily and regularly exercise[d] discretion and independent judgment" (29 C.F.R. § 541.2(b)). In the order granting F.H. Paschen's motion for summary judgment, the trial

court similarly failed to address whether Herrera or Brenner fell within any of the three categories of employees set forth in 29 C.F.R. part 541.2(c).

The test for determining whether an employee is exempt pursuant to the administrative exemption is written in the conjunctive. (See 29 C.F.R. § 541.2 as incorporated by Cal. Code Regs., tit. 8, § 11160, subd. 1(A)(3).) F.H. Paschen's failure to establish that Herrera or Brenner performed in a manner consistent with any of the three categories of employees described in 29 C.F.R. part 541.2(c) requires reversal of the trial court's grant of summary judgment. (*Eicher, supra,* 151 Cal.App.4th at p. 1372; see also 29 C.F.R. § 541.201(b) [in determining whether employee is subject to administrative exemption one must examine whether employee's "duties, responsibilities, and salary meet *all the requirements* [of 29 C.F.R. part 541.2]," italics added].)[10]

Further, a consideration of the undisputed evidence that F.H. Paschen presented in the trial court reveals that F.H. Paschen failed to establish as a matter of law that Herrera and Brenner's job duties met the requirements of 29 C.F.R. part 541.2(c). As noted above (see part II, *ante*), F.H. Paschen presented undisputed evidence that Herrera and Brenner prepared proposals pursuant to the JOC, produced project schedules, coordinated with subcontractors, acted as liaisons with owners, coordinated material procurement and

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10 All of the federal cases on which F.H. Paschen principally relies in its opening brief, *O'Dell v. Alyeska Pipeline Service Co.* (9th Cir. 1988) 856 F.2d 1452, *Reyes v. Hollywood Woodwork, Inc.* (S.D. Fla. 2005) 360 F.Supp.2d 1288, 1289, and *Wells v. Radio Corp. of America* (D.C.N.Y. 1948) 77 F.Supp. 964, 971, are inapposite to this issue because none of the courts in those cases discussed 29 C.F.R. part § 541.2(c).

delivery, produced cost reports, documented changes that could affect project completion or budgets, and communicated with senior management regarding the status of projects.

This evidence does not demonstrate as a matter of law that Herrera or Brenner "regularly and directly assist[ed] a proprietor, or an employee employed in a bona fide executive or administrative capacity" (29 C.F.R. § 541.2(c)(1)), or that they acted in a fashion similar to an "[e]xecutive [or] administrative assistant[]," as defined in 29 C.F.R. part 541.201(a)(1). Nor does this evidence demonstrate that Herrera or Brenner "execute[d] under only general supervision *special* assignments and tasks." (29 C.F.R. § 541.2(c)(3), italics added.) On the contrary, it was undisputed that Herrera and Brenner served as project managers on *ordinary* JOC projects, a standardized outline of which F.H. Paschen provided in its statement of undisputed facts.

F.H. Paschen also did not demonstrate as a matter of law that either Herrera or Brenner performed "work along specialized or technical lines. . . ." (29 C.F.R. § 541.2(c)(2).) While F.H. Paschen asserted in its separate statement of facts that a project manager "must have knowledge and experience with construction projects" in developing proposals pursuant to a JOC, Herrera and Brenner presented evidence that their preparation of such proposals was largely routinized. Specifically, Herrera and Brenner presented evidence that they prepared proposals by simply inputting information provided by project owners and subcontractors, using a computer software program. F.H. Paschen also failed to establish as a matter of law that the job of project manager required "special training, experience, or knowledge." In his declaration, Brenner stated:

"Prior to working for Defendants, I was working doing demolition and abatement. I had no project management experience prior to working with Defendants."

The federal interpretative regulations support the conclusion that F.H. Paschen failed to demonstrate as a matter of law that the job duties of Herrera and Brenner met the criteria contained in 29 C.F.R. part 541.2(c)(2) for determining whether an employee is subject to the administrative exemption. That regulation provides that employees who meet these criteria may be described as "staff rather than line employees, or as functional rather than departmental heads." (29 C.F.R. § 541.201(a)(2)(i).) In its statement of undisputed facts, F.H. Paschen noted that it staffs *each* construction project with a minimum of one project manager. Thus, one could conclude that Herrera and Brenner might more aptly be characterized as line, rather than staff, employees. As line employees, Herrera and Brenner would not meet the criteria of employees subject to the administrative exemption provided in 29 C.F.R. part 541(c)(2). (See 29 C.F.R. § 541.201(a)(2)(i).)

The regulation also states that employees who meet these criteria include "advisory specialists to the management," such as "tax experts, insurance experts, sales research experts, wage-rate analysts, investment consultants, foreign exchange consultants, and statisticians." (29 C.F.R. § 541.201(a)(2)(i).) F.H. Paschen did not present any evidence that Herrera or Brenner acted as advisors to senior management. On the contrary, according to F.H. Paschen's statement of facts, their duties were to "manag[e] and administer[] the individual projects. . . ."

We conclude that F.H. Paschen failed to establish as a matter of law that the job duties of Herrera or Brenner met the requirements of 29 C.F.R. part 541.2(c). Accordingly, we further conclude that F.H. Paschen failed to established as a matter of law the existence of all of the criteria necessary to establish that either Herrera or Brenner were subject to the administrative employee exemption. (See, e.g., *Eicher, supra*, 151 Cal.App.4th at p. 1372 [employer must establish all criteria of administrative exemption test in order to demonstrate that employee is subject to exemption].) The trial court thus erred in granting summary judgment in favor of F.H. Paschen on the ground that it had established, as a matter of law, that Herrera and Brenner were exempt employees.

b. *F.H. Paschen was not entitled to summary judgment with respect to Herrera's claims for the additional reason that it failed to establish as a matter of law that Herrera primarily performed nonmanual work*

F.H. Paschen's motion for summary judgment as to Herrera fails for an additional reason. In order to demonstrate that Herrera was employed in an exempt position, F.H. Paschen was also required to prove, among other elements, that he primarily performed "*office or nonmanual work* directly related to management policies or general business operations of his employer or his employer's customers."[11] (29 C.F.R. § 541.2(a)(1), italics added.) Accordingly, in moving for summary judgment on the ground that it had established the administrative exemption affirmative defense as a matter of law, F.H. Paschen was required to establish that there was no disputed issue of fact as to whether

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11 It is undisputed that 29 C.F.R. part 541.2(a)(2), which pertains to the administration of a school system, is not applicable in this case.

Herrera performed nonmanual work more than one-half of the time. (See § 515, subd. (e); Cal. Code Regs., tit. 8, § 11160, subd. 1(A)(3), fn. 1 [defining "primarily" as meaning more than one-half of the employee's work time].) It failed to do so.

In its statement of undisputed facts in support of its motion for summary judgment, F.H. Paschen stated, "Plaintiffs did not perform manual labor more than 50 [percent] of the time." Herrera disputed this fact in his separate statement of disputed facts. Specifically, Herrera cited his deposition testimony, in which he testified that his supervisor directed him to work at the McDowell Middle School during a 30-day period in August 2003. While at the school, Herrera stated that he acted as a "laborer, carpenter, hands-on filling holes type of individual." Herrera also cited a portion of his declaration in which he testified that, while working at another job site, he had performed manual labor including "tak[ing] down light fixtures, wall, and plumbing fixtures, demolish[ing] carpeting, rebuild[ing] framing, intall[ing] containment barriers, conduct[ing] mold abatement . . . , tak[ing] out tiles and remov[ing] sinks and insulation." In that same declaration, Herrera stated, "I would estimate that I spent approximately 51% of my time working for Defendants performing manual labor."

Although F.H. Paschen objected to portions of Herrera's declaration in the trial court,[12] the court overruled the objections in its order granting summary judgment. F.H. Paschen has not raised any claim on appeal that the trial court erred in overruling its

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12 F.H. Paschen did not object to Herrera's deposition testimony.

objections.[13] Therefore, we must consider Herrera's declaration in reviewing the trial court's grant of summary judgment. (See *Lonicki v. Sutter Health Cent.* (2008) 43 Cal.4th 201, 206 [on appeal from summary judgment, reviewing court must consider "'all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained"']; *Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1182, fn. 5 [party forfeits any challenge to summary judgment evidentiary rulings on appeal by failing to raise any contention regarding the rulings].)

In this court, F.H. Paschen asserts, "Appellants did not perform manual labor more than 50% of the time." In support of this assertion, F.H. Paschen cites Wade Faunterloy's declaration and the deposition testimony of Timothy Stone. In his declaration, Faunterloy testified that he worked closely with Herrera for two to three months in 2003, and that he did not see Herrera perform any manual labor during this period. In his deposition testimony, Stone stated that he never observed a project manager perform manual labor during Stone's tenure overseeing F.H. Paschen's project managers in California.

In its order granting summary judgment, the trial court cited a portion of Stone's declaration in which Stone stated "Any manual labor that may been performed by a

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13 F.H. Paschen does broadly claim that "appellants' disputed facts are supported by declarations by the appellants that contradict their own sworn testimony." However, F.H. Paschen does not cite any testimony that Herrera provided that contradicts his declaration regarding the percentage of his work time that he spent performing manual labor.

Project Manager was not at the direction of [F.H. Paschen]." Even accepting, for the sake of argument, Faunterloy and Stone's statements that Herrera did not perform manual labor during more than 50 percent of his work time, this would not establish this material fact to be undisputed, in view of Herrera's declaration to the contrary.

In light of Herrera's declaration, quoted above, we conclude that F.H. Paschen failed to establish as a matter of law that Herrera primarily performed nonmanual work. Accordingly, we conclude that F.H. Paschen failed to establish as a matter of law that Herrera was subject to the administrative employee exemption, for this additional reason. (See, e.g., *Eicher*, *supra*, 151 Cal.App.4th at p. 1372.)

IV.

DISPOSITION

The judgment is reversed.

AARON, J.

WE CONCUR:

McCONNELL, P. J.

McINTYRE, J.